Supreme Court, U.S.
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Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES THOMPSON, PETITIONER

V.

STATE OF GEORGIA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Please Serve:

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BEST AVAILABLE COPY

QUESTION PRESENTED:

WHETHER IT WAS FUNDAMENTALLY UNFAIR TO EXCLUDE THE RESULTS OF A POLYGRAPH EXAMINATION WHICH DEMONSTRATED THAT THE PETITIONER WAS INNOCENT OF THE CRIME ESPECIALLY WHERE SAID RESULTS WERE NECESSARY FOR THE PETITIONER TO CONFRONT A WITNESS.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Georgia Court of Appeals.

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is reported as *State v. James Thompson*, A04A0741. A copy of this opinion is attached as Appendix "A," to this petition.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on May 24, 2004. This court has jurisdiction pursuant to United States Supreme Court Rule 12&13, over this matter as it is an appeal from the denial of the Georgia Supreme Court to exercise discretionary review of a holding of the Georgia Court of Appeals. The Georgia Supreme Court entered its order on September 7, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall

enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

JAMES THOMPSON, Petitioner, was indicted on December 2, 2002 with five counts of child molestation by a Grand Jury in Greene County, Georgia; counts I, II and IV related to the alleged victim Heather Patrick (H.P.) and Counts III and V, Amber Simpson(A.S.).

Petitioner's trial was specially set and began on May 27, 2003, the trial judge was the Honorable Hugh Wingfield and the Ocmugee Judicial Circuit prosecutor was Dawn Baskin.

On May 29, 2003, the jury returned a verdict of not guilty on counts I and IV and guilty on counts II, III and V.

Petitioner, James Thompson, was investigated by

Sergeant Clay Thornton beginning on or about January 29, 2002 based upon the allegations made by DFACS worker Amy Ashe that Petitioner had molested Amber Simpson and Heather Patrick, his stepchildren.(T. 103)

It is uncontroverted that Thornton wrote in paragraph two of an incident report that "after talking to all parties involved and wanting to find what exactly the truth is in this matter I asked Mr. Thompson if he would agree to take a polygraph test on April 04, 2002, Mr. James Thompson agreed to take and was given a polygraph by GBI Agent Wigby in Milledgeville, GA. Agent Wigby advised me that according to the test Mr. Thompson did not commit the crime alleged against him. After learning the results of this test, I am closing this case and in my opinion no further investigation is required."

The trial court precluded any reference to any events concerning this polygraph examination including those questions which did not call for the witness to reveal the existence of polygraph results.

Neither Heather Patrick or Amber Simpson testified at trial, in fact the State's entire case was based upon hearsay testimony and ten-year-old allegations made by two similar transaction witnesses, Jamie Callaway, (T. 301) and Krystle Shelnutt (T. 306).

There was no evidence presented at trial either through child hearsay or direct testimony where Heather Patrick claimed Petitioner molested her and Amber Simpson recanted her testimony. (T. 171. 7-18)

Lastly, the Defense presented the mother of the two alleged victims Tracy Thompson who testified that

she never witnessed any acts of molestation. (T. 316. 8-10)

REASON FOR GRANTING THE WRIT:

During the direct testimony of Amy Ashe, the State elected to preempt the Defense and explain the initial decision not to file charges against Appellant by law enforcement Officer Clay Thornton with the following line of questioning: " Did you have an occasion to have specific contact with any one individual there? (T. 106 11-12) A. "Yes, Captain Thornton and I worked closely together on that." (T. 106. 13-14) What is the purpose of this line of questioning? Other than to bolster Amy Ashe's credibility by demonstrating that she was differential and even attempted to work with law enforcement before proceeding alone. This is further demonstrated by the next question and answer to wit. Q. "Okay when there is a joint investigation by the Department of Family and Childrens Services and law enforcement at some point in time does one agency take the lead? (T. 106. 19-21) A. "Yes, the law enforcement obviously takes the lead. So we tend to take the back seat so we don't hinder the investigation." (T. 106. 22-24). This line of questioning does not end but rather continues in an effort to paint Clay Thornton as a derelict who does not attend to his duties or in the words of the prosecutor "leaves the investigation" for other non-law enforcement personnel to complete to wit: "And at some point in time did law enforcement leave the investigation for awhile?"(T. 107. 8-9) A. "Yes they did" (T. 107. 10)

A reasonable inference for jurors to draw from

this questioning is that Clay Thornton was simply negligent in that he failed to act and even left this ongoing investigation. It was therefore necessary for someone to continue the investigation picking up where Thornton left off. That person according to the state was Amy Ashe.

For certain, now, the Appellant is at least entitled to confront the doubts of Clay Thornton's decision to "leave the case" raised by Amy Ashe. Was it an unwarranted dereliction of duty or based upon something which would cause an officer as experienced as Thornton to stop for fear that an innocent man would be wrongfully accused? These are the questions raised by the State and left unanswered at the end of Amy Ashe's testimony, and for that matter at the end of the case, since the State never planned to call Captain Thornton, news that apparently came as a shock to the trial court to wit: [MR. MITCHAM]" Oh, the State -- does the state intend on calling Captain Thornton? (T. 341. 23-24) MR. MITCHAM: We do not, Your Honor.(T. 341. 25) Thus, it is reasonable to conclude this decision was calculated.

In order to confront Amy Ashe's assertion that she had to retake the lead role because Clay Thornton decided to "leave for awhile ", it was necessary to call Thornton as a witness once the State rested it's case and reveal the true basis behind his decision to close his investigation, i.e., the statement of Agent Wigby "He did not commit this crime" and the use of the polygraph.

Can Appellant, now use the results and circumstances surrounding the polygraph to rebut the testimony of Amy Ashe? Yes. "The use of polygraph evidence is proper when explaining the motives and

conduct of the investigating officer." *Carr v. State*, 259 Ga. 318, (380 SE2d 700) (1989). However, the Appellant was never allowed to elicit this testimony because the trial court instructed Appellant and the witness Clay Thornton to make no mention of the polygraph or any circumstances surrounding same to wit: "... There's going to be no testimony about a polygraph examination. Now is that crystal clear? And I'm also going to instruct Officer Thornton that if he's called as a witness ... that he is not to disclose any evidence concerning a polygraph examination. Now does everybody understand that? (T. 332-333. 20-2); "... And ... just to be safe without us playing any games in the morning I'm going to instruct Officer Thornton that he is not to respond to any questions and you're not to ask any questions which would elicit that testimony. And that is my order. (T. 334. 8-12)

Clay Thornton testified in response to direct questioning that he closed his case because the allegations made by Heather Patrick could not be substantiated to wit: "... But it wasn't substantiated and the snake wasn't enough for me to continue to investigate with just the snake. It really could have been a snake."

To conform to the order of the trial court, Clay Thornton had to chose his words carefully and the Appellant was left with the words "unsubstantiated" versus the phrases: " **to find what exactly the truth is in this matter"** and **"Agent Wigby advised me that according to the test Mr. Thompson did not commit the crime alleged against him."**

Accordingly, the trial court erred by ordering that neither the Petitioner or his witness Clay Thornton make any reference to the polygraph or circumstances surrounding it.

CONCLUSION

For all of the reasons stated above Petitioner moves this Court to reverse the decision of the Georgia Court of Appeals.

Respectfully submitted

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APPENDIX "A"

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In the Court of Appeals of Georgia

A04A0741. THOMPSON v. THE STATE.

ANDREWS, Presiding Judge.

Convicted by a jury of three counts of child molestation, James Thompson, Jr. appeals.

1. In his first enumeration of error, Thompson contends that his Sixth Amendment right to confront witnesses was violated by the trial court's refusal to allow him to introduce the fact that he took a polygraph examination indicating he was truthful in denying the molestation, and the investigation was closed by police for a time. There was no stipulation that the polygraph results would be admissible. The law in this state is well-established that absent stipulation by the parties, the jury may be apprised that a polygraph test has been administered to explain an actor's conduct or motives *only* when "the conduct and motives of the actor are matters concerning which the truth must be found (i.e., are relevant to the issues on trial)." *Wilson* v. *State,* 254 Ga. 473, 476 (330 SE2d 364) (1985) (quoting *Cromerv. State, 253* Ga. 352, 356 (320 SE2d 751) (1984) and *Momon* v. *State,* 249 Ga. 865, 867 (294 SE2d 482) (1982». (Emphasis supplied.) *Morris v. State,* 264 Ga. 823, 824 (2) (452 SE2d 100) (1995). Thompson argues that, because Ashe, the DF ACS investigator, testified that, at some point, law enforcement left the investigation for a while, he was entitled to have Officer Thornton testify that

Thompson had taken the polygraph and that he had "passed," based on *Carr* v. *State,* 259 Ga. 318, 319 (1) (380 SE2d 700) (1989). In *Carr,* however, it was the State's witness, who was present during the crime, who had taken a polygraph and no mention was made of the results. This evidence came out,following Carr's cross-examination of the investigating officer regarding his focus on Carr as the suspect as opposed to the witness. It was held that this area of questioning by the defense opened the issue of the taking of the polygraph for the State to pursue.

Here, the trial court concluded that the examination of Ashe did not open this area up and that the actions of Officer Thornton in this regard were not "matters concerning which the truth must be found." *Wilson v. State,* supra. 2 We find no error. Id.; *Holland v. State,* 221 Ga. App. 821, 824-825 (2) (472 SE2d 711) (1996); see *Slakman v. State,* 272 Ga. 662, 670 (6) (533 SE2d 383) (2000).

2. Thompson's counsel called Officer Thornton as his witness and asked him a number of questions regarding Thompson's cooperation with police. He asked Thornton "[d]id anyone ever tell you that he didn't commit the crime?"' The State's hearsay objection was sustained and Thompson contends this was error. Any response to such a question would be hearsay. OCGA § 24-3-1. As discussed in Division **1,** no explanation of Officer Thornton's conduct was necessary and the answer would not qualify under OCGA § 24-3-2 as argued by Thompson. Also, the question asked for

an opinion on the issue of Thompson's guilt or innocence and Georgia courts have repeatedly held that a witness, including an expert witness, may not express his or her opinion on the ultimate issue in a case. *Gosnell v. State,* 247 Ga. App. 508, 509 (2) (a) (544 SE2d 477) (2001), citing *Allison v. State,* 2 As stated in *Teague v. State,* 252 Ga. 534,536 (1) (314 SE2d 910) (1984), "[i]t will be seen that only in rare instances will the 'conduct' of an investigating officer need to be 'explained,' . . . ." 256 Ga. 851, 853 (5) (6) (353 SE2d 805) (1987), *Putnam* v. *State,* 231 Ga. App. 190, 191 (2) (498 SE2d 340) (1998) (physical precedent only); *Hilliard* v. *State,* 226 Ga. App. 478, 479-480 (1) (487 SE2d 81) (1997).

3. In his third enumeration, Thompson urges error in the refusal of Ashe to answer his questions regarding who first reported the suspected abuse, claiming this also violated his Sixth Amendment rights. When first asked the identity of the informant, Ashe properly responded that the information was confidential. OCGA § 49-5-40 (b); *Honeycutt* v. *State,* 245 Ga. App. 819, 820 (2) (538 SE2d 870) (2000). Thompson then asked the trial court to direct that this information be provided. As pointed out by the court, however, Thompson had not availed himself of the procedure set out in OCGA § 49-5-41 (a) (2) which provides for the court's subpoenaing the records and reviewing them in camera to determine if any information therein is necessary for determination of an issue before the court. There was no error. See *Dunagan* v. *State,* 255 Ga. App. 309, 310 (2) (565 SE2d 526) (2002); Honeycutt, supra.

4. Thompson's fourth enumeration is that the trial court erred in allowing Baldwin, the interviewer of the children, to testify regarding A. S.' statement that she saw H. P. being molested because the statement was hearsay, based on *Woodard* v. *State,* 269 Ga. 317, 321 (496 SE2d 896) (1998). A. S. told Baldwin that Thompson, on several occasions, touched her "pee pee" and her "do do" and that she had seen his body parts, including his dick, and that he had made her touch his dick. A. S. said H. P. was present and laughed. Asked if A. S. had seen anything in reference to H. P., Baldwin responded that "she stated that he had hurt [H. P.] also." The State argued that the statement was admissible because A. *S.'* observation was part of the res gestae, which included abuse of both girls in the presence of each other.

First, we note that it is unclear to what act "hurt" refers, since both children related that Thompson spanked them, which hurt. Also, the conduct observed was arguably admissible as res gestae. See *Berry* v. *State,* 235 Ga. App. 35,36 (1) (508 SE2d 435) (1998); *Gibby* v. *State,* 213 Ga. App. 20,21 (2) (443 SE2d 852) (1994). Finally, even considering the comment as violative of *Woodard,* supra, any error was harmless. The test for harmless error in a criminal case is whether it is highly probable that the error did not contribute to the judgment. *Johnson* v. *State,* 238 Ga. 59,61 (230 SE2d 869) (1976). Here, in addition to the statements of A. S. and H. P., there was medical evidence of physical injury to H. P. consistent with sexual abuse, and both children

identified Thompson as the one who hurt them. Therefore, the statement, if improper, was cumulative of other admissible evidence. *Hanson* v. State, 263 Ga. App. 45,46-47 (1) (587 SE2d 200) (2003).

5. The remaining two enumerations are addressed to the legal sufficiency of the evidence and are considered together. Reviewed in the light most favorable to the verdict, *Singleton* v. *State,* 231 G3:' App. 694 (1) (500 SE2d 411) (1998), the record shows that the victim children testified as to the acts 'of child molestation as alleged in the indictment. A. S. described child molestation by Thompson showing his penis and making her touch it with her hand. She also graphically described facts indicating Thompson's arousal. H. P. suffered physical injuries consistent with molestation. Although Thompson denied the charges and argued inconsistencies in the children's statements, "all conflicts [are] resolved in favor of the verdict. *Selfv. State,* 208 Ga. App. 447, 448 (431 SE2d 126)(1993)." *Metts* v. *State,* 210 Ga. App. 197 (1) (435 SE2d 525) (1993). ""The testimony of a single witness is generally sufficient to establish a fact." OCGA § 24-4-8.' [Cit.]" *Weeks* v. *State,* 220 Ga. App. 141, 143 (2) (469 SE2d 316) (1996).

The evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt ofthe offenses for which he was convicted and sentenced. *Jackson* v. *Virginia,* 443 U. S. 307 (99 SC 2781, 61 LE2d560) (1979); *Metts* v. State, supra.

Judgment affirmed. Miller and Ellington, JJ., concur.

SUPREME COURT OF THE STATE OF GEORGIA
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DATE: September 7, 2004

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Case No. S04C1680

JAMES THOMPSON V. THE STATE

COURT OF APPEALS CASE NO. A04A0741

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sherie M. Welch, Clerk